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**REGULATION OF AIR TRAFFIC—THE D.C. CIRCUIT
HOLDS THAT THE FAA HAS STATUTORY AUTHORITY
TO ALTER FLIGHT ROUTES TO MITIGATE THE IMPACT
OF AIRCRAFT NOISE ON RESIDENTIAL AREAS**

HUY LY*

TRADITIONALLY, PROPERTY OWNERS around airports relied on ineffective “state and local noise ordinances and nuisance and inverse condemnation claims” to ameliorate the adverse effects of aircraft noise in their communities.¹ As levels of air traffic and federal involvement in controlling aircraft noise increased, Congress enacted the Federal Aviation Act (Act) and subsequently delegated to the Federal Aviation Administration (FAA) “broad authority to control and regulate the use of navigable airspace and aircraft operations” in 49 U.S.C. § 40103.² Congress also added § 44715(a), which broadly authorizes the FAA to set standards for aircraft noise measurement and to prescribe “regulations to control and abate aircraft noise.”³ However, neither § 40103 nor § 44715(a) explicitly addresses whether the FAA can regulate air traffic for the purpose of residential noise abatement.⁴

The D.C. Circuit’s recent decision in *Helicopter Ass’n International v. FAA* answers this question.⁵ In § 40103(b)(1), Congress requires the agency to “develop plans and policy for the use of the navigable airspace and [to] assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and

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¹ Kristin L. Falzone, Comment, *Airport Noise Pollution: Is There a Solution in Sight?*, 26 B.C. ENVTL. AFF. L. REV. 769, 771, 775 (1999).

² *Id.* at 781–82, 800–01; 49 U.S.C. § 40103 (2006).

³ 49 U.S.C. § 44715(a) (2006); see Falzone, *supra* note 1, at 783.

⁴ See 49 U.S.C. §§ 40103, 44715(a); see also Falzone, *supra* note 1, at 782–83.

⁵ See *Helicopter Ass’n Int’l v. FAA*, 722 F.3d 430, 434–35 (D.C. Cir. 2013).

the efficient use of airspace.”⁶ Subsection (b)(2) further provides that the agency “*shall* prescribe air traffic regulations on the flight of aircraft (including regulations on safe altitudes) for . . . *protecting individuals and property* on the ground.”⁷ Having considered § 40103’s language, the D.C. Circuit correctly held that § 40103(b)(2) authorizes the FAA to set air traffic procedures to protect individuals and property on the ground from the adverse effects of aircraft noise.⁸ On the other hand, the court unwisely incorporated common law nuisance into its analysis, though this approach does not interfere with the FAA’s substantive rights and obligations afforded by its general authority in § 40103.⁹

Helicopter Association International, Inc. (HAI) is a professional trade association representing small entities that provide leisure flights to New Yorkers traveling to eastern Long Island.¹⁰ Traditionally, flights from New York to eastern Long Island followed one of three paths: (1) the north, (2) the middle, or (3) the south.¹¹ However, many helicopter operators began to prefer flying along the north path to save time and avoid weather delays.¹² In 2008, in response to growing public apprehension over the helicopter noise plaguing the communities of northern Long Island, the FAA established the North Shore Helicopter Route (Route), which is located approximately one mile offshore.¹³ The Route was designed to reduce the impact of noise on northern Long Island communities, allow pilots to reach their destinations without additional equipment, and minimize safety issues by limiting interaction with other aircraft.¹⁴ The FAA initially stated that use of the Route was voluntary.¹⁵

In 2010, the FAA received more than 900 noise complaints during a short thirty-day comment period.¹⁶ Some commenters

⁶ 49 U.S.C. § 40103(b)(1).

⁷ *Id.* § 40103(b)(2) (emphasis added).

⁸ *See Helicopter Ass’n Int’l*, 722 F.3d at 433–34.

⁹ *See id.* at 434.

¹⁰ Initial Brief for Petitioner at 7, *Helicopter Ass’n Int’l v. FAA*, 722 F.3d 430 (D.C. Cir. 2013) (No. 12-1335); Initial Brief for the Respondent at 46, *Helicopter Ass’n Int’l v. FAA*, 722 F.3d 430 (D.C. Cir. 2013) (No. 12-1335).

¹¹ *Helicopter Ass’n Int’l*, 722 F.3d at 431.

¹² *Id.* at 431–32.

¹³ *Id.* at 432; *see* The New York North Shore Helicopter Route, 77 Fed. Reg. 39,911, 39,911–12 (July 6, 2012) (to be codified at 14 C.F.R. pt. 93).

¹⁴ The New York North Shore Helicopter Route, 77 Fed. Reg. at 39,911–12.

¹⁵ *Id.* at 39,911.

¹⁶ *Id.* at 39,913.

“noted that the helicopter noise interfere[d] with sleep, conversation, and outdoor activities, while others complained that the helicopters fl[ew] so low that their walls vibrated.”¹⁷ Recognizing the need to assess the noise impact, the FAA issued the New York North Shore Helicopter Route (Final Rule) requiring all civil helicopter pilots to use the Route for two years.¹⁸ The Final Rule will expire if “no meaningful improvement” occurs.¹⁹ In addition, the Final Rule includes exceptions for helicopter pilots to deviate from the Route “for reasons of safety, weather, or to transit to [their] destination[s].”²⁰

Displeased with the FAA’s decision, HAI petitioned to overturn the Final Rule, arguing, among other things, that § 40103 is limited by subsection (b)(1)’s focus on safety and that the Act’s pertinent provisions confined aircraft noise regulations to technology certification and to the vicinity of airports.²¹ In response, the FAA argued that the Final Rule is authorized by § 40103(b)(2) or, alternatively, by § 44715(a).²² Writing for the court, Judge Rodgers applied the two-step test set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.* to determine whether the FAA exceeded § 40103(b)(2)’s congressional limits.²³ This test involves an assessment of (1) whether Congress’s intent is clear, and (2) if Congress’s intent is not clear, whether the agency’s regulation is a permissible interpretation of the statute.²⁴ In addition, the court must defer to the FAA’s statutory interpretation under *Chevron*’s second step.²⁵ Upon review, the court affirmed the Final Rule under § 40103(b)(2) but declined to address § 44715(a) as an alternative basis of authority.²⁶

To begin, the D.C. Circuit applied the first step of *Chevron*’s two-step analysis by determining whether Congress clearly delegates to the FAA in § 40103(b)(2) the authority to prescribe air traffic regulations to protect individuals and property from the adverse effects of aircraft noise.²⁷ In *Regents of the University of*

¹⁷ *Id.*

¹⁸ *Id.* at 39,911, 39,918.

¹⁹ *Id.* at 39,918.

²⁰ *Id.*

²¹ *Helicopter Ass’n Int’l v. FAA*, 722 F.3d 430, 433 (D.C. Cir. 2013).

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.* at 435.

²⁷ *Id.* at 433–35.

California v. Public Employment Relations Board, the Supreme Court looked at two main factors for determining Congress's intent: (1) the normal meaning of the statutory language, and (2) whether the statute's legislative history suggests a narrow or broad reading of the statutory language.²⁸ Applying *Regents'* first factor, the D.C. Circuit concluded that § 40103(b)(2)'s term "protect"—defined as "to cover or shield from that which would injure, destroy, or detrimentally affect"—sufficiently encompasses protection from aircraft noise.²⁹ Thus, "by giving the language its normal meaning,"³⁰ the court found clear Congress's intent to allow the FAA to alter air traffic for the purpose of aircraft noise abatement.³¹ In reaching its conclusion, the court also relied on the common law of torts, which has long deemed the production of certain noise levels to be "an actionable nuisance because of its impediment to the use and enjoyment of property."³² The court indirectly addressed the second *Regents* factor when it found no indication of a congressional intent inconsistent with its broad statutory reading.³³

Turning to HAI's arguments, the court quickly rejected the assertion that the FAA is limited to regulating aircraft noise through technology certification and in the vicinity of airports because neither the substance nor the structure of those noise regulation provisions suggests such limitations.³⁴ The court then looked to *City of Burbank v. Lockheed Air Terminal Inc.* to address HAI's other assertion that air safety is the primary goal of § 40103.³⁵ In *Lockheed*, the Court was faced with the question of whether the Act preempted a local ordinance that was intended to relieve adverse noise effects on residential areas by limiting aircraft takeoff hours.³⁶ The Court examined the Act's legislative history and found that "the pervasive nature of the scheme of federal regulation of aircraft noise" revealed Congress's intent to leave no room for state and local control over aircraft noise.³⁷

²⁸ *Regents of Univ. of Cal. v. Pub. Emp't Relations Bd.*, 485 U.S. 589, 595 (1988).

²⁹ *Helicopter Ass'n Int'l*, 722 F.3d at 434 (internal quotation marks omitted).

³⁰ *Regents of Univ. of Cal.*, 485 U.S. at 598.

³¹ *See Helicopter Ass'n Int'l*, 722 F.3d at 433-34.

³² *Id.* at 434.

³³ *See id.*

³⁴ *Id.*

³⁵ *See id.*

³⁶ *See City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 625-27 (1973).

³⁷ *Id.* at 633, 638.

First, the 1958 Act's Senate Report recognized the FAA's long-possessed role in regulating aircraft flights to control aircraft noise.³⁸ Second, during the passage of the 1972 Act, the President and two key congressmen confirmed their intentions to vest the FAA with regulatory authority over "the most significant sources of noise [that] move in interstate commerce."³⁹ In particular, the Court was concerned that the ordinance, if allowed, "would severely limit the flexibility of [the] FAA in controlling air traffic flow."⁴⁰ The Court also interpreted § 40103's predecessor to require a "balance between safety and efficiency and the protection of persons on the ground."⁴¹ Drawing from *Lockheed's* interpretation, the D.C. Circuit implicitly recognized safety, efficiency, and protection as separate goals for § 40103's air traffic regulation.⁴²

In its discussion of HAI's arguments, the court also addressed dictum from the First Circuit that provided a contrary view of the scope of the FAA's authority.⁴³ In *DiPerri v. FAA*, the First Circuit initially suggested that the FAA's failure to alter aircraft patterns "to avoid causing a nuisance to the residents" indicated that § 40103's predecessor could have provided injunctive relief to the plaintiffs.⁴⁴ However, the court later dismissed this suggestion because (1) the Act appeared to be concerned with safety, rather than noise, and (2) Congress's subsequent enactment of aircraft noise regulation in a different section of the Act implied its intent to use this latter section as the proper vehicle for noise abatement.⁴⁵ After interpreting § 40103's language and rejecting HAI's assertions, the D.C. Circuit dismissed the First Circuit's "unpersuasive" view as well as its reliance on an incomplete legislative history.⁴⁶

Turning to *Chevron's* second step of its two-part analysis, the court concluded that even if Congress is silent on the precise question, the FAA's regulation is "reasonable and consistent" with the provisions cited in HAI's assertions.⁴⁷ Specifically, HAI failed to establish that Congress did not intend to address air-

³⁸ *Id.* at 635–38.

³⁹ *Id.*

⁴⁰ *Id.* at 639.

⁴¹ *Id.* at 638–39 (citation omitted).

⁴² See *Helicopter Ass'n Int'l v. FAA*, 722 F.3d 430, 434 (D.C. Cir. 2013).

⁴³ *Id.*

⁴⁴ *DiPerri v. FAA*, 671 F.2d 54, 56–57 (1st Cir. 1982).

⁴⁵ *Id.*

⁴⁶ *Helicopter Ass'n Int'l*, 722 F.3d at 434.

⁴⁷ *Id.* at 435.

craft noise through air traffic flights and certification.⁴⁸ In reaching its holding, the court also addressed another case cited by HAI involving the Environmental Protection Agency (EPA).⁴⁹ In *American Petroleum Institute v. EPA*, the EPA relied on a federal statute to prescribe a regulation that would not necessarily reduce harmful volatile organic compound (VOC) and toxic emissions.⁵⁰ However, a relevant section in the statute unambiguously directed the agency to set regulations for reducing VOC and toxic emissions.⁵¹ The court apparently invoked *Chevron's* first step to reverse the regulation because the EPA's regulation was contrary to Congress's explicit intent.⁵² The D.C. Circuit distinguished *American Petroleum* from the case at issue because, in the instant case, the FAA did not "flout[] a congressionally imposed restriction" in the Act.⁵³

The D.C. Circuit correctly refused to limit the scope of § 40103(b)(2). Doing otherwise would contravene Congress's clear intent to grant the FAA broad authority in controlling aircraft flight.⁵⁴ The court's broad reading of § 40103(b)(2) is confirmed not only by the first factor in the *Regents* test but also by the Act's conclusive legislative history, i.e., the second factor.⁵⁵ First, the House Report characterized the FAA's authority on the allocation of airspace and management of its use by civil aircraft as "plenary."⁵⁶ Second, the Senate Report and key figures' statements made before and during the passage of the Act confirmed the FAA's exclusive control over air traffic flow in the context of controlling aircraft noise.⁵⁷ Such broad characterizations coupled with the FAA's vested responsibilities supply unambiguous evidence of congressional intent to confer upon the agency expansive rulemaking authority to combat noise within the air traffic network.⁵⁸ Thus, Congress has confirmed § 40103's broad scope, which conflicts with HAI's narrow read-

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ See *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1119-20 (D.C. Cir. 1995).

⁵¹ *Id.* at 1120.

⁵² See *id.* at 1119-21.

⁵³ *Helicopter Ass'n Int'l*, 722 F.3d at 435.

⁵⁴ See *City of Burbank v. Lockheed Air Terminal Inc.*, 411 U.S. 624, 633, 638 (1973).

⁵⁵ See *Regents of Univ. of Cal. v. Pub. Emp't Relations Bd.*, 485 U.S. 589, 594-95 (1988).

⁵⁶ *Nw. Airlines, Inc. v. Goldschmidt*, 645 F.2d 1309, 1316 (8th Cir. 1981).

⁵⁷ *Lockheed Air Terminal Inc.*, 411 U.S. at 634-38.

⁵⁸ See *Helicopter Ass'n Int'l*, 722 F.3d at 434-35.

ing and the *DiPerri* court's inadequate analysis of § 40103's legislative history.⁵⁹

Further, this case's narrow facts justify the court's holding. Congress's conscious selection of broad language, such as "aircraft" and "protect," in § 40103(b)(2) demonstrates affirmative congressional intent to grant the FAA flexible authority to shield or cover individuals and property on the ground from the detrimental effects of airplanes, helicopters, jets, and other interstate-flying aircraft.⁶⁰ Specifically, noise and vibrations created by aircraft can "render[] . . . properties unfit for residential use."⁶¹ In addition, aircraft noise "has been found to cause psychological and physiological damage to [affected Americans'] health and well-being."⁶² In the case at hand, the noise produced by low-flying helicopters has adversely affected Long Island residents' sleep quality, daily activities, and housing for many years.⁶³ Because § 40103(b)(2) provides the communities with a shield from the cumulative adverse effects of helicopter noise, the injury to Long Island property and residents clearly falls within the broad coverage of this section.

Likewise, the court properly analyzed *Chevron's* second step and contrasted *American Petroleum* with the case at hand.⁶⁴ First, assuming arguendo that Congress does not clearly authorize the FAA's regulation, the regulation would have received deference under *Chevron's* second step.⁶⁵ The court's deference is particularly appropriate in this context given (1) the FAA's exclusive authority to regulate the airspace of the United States and (2) the highly complex field's requirement for advanced air traffic expertise.⁶⁶ In addition, neither § 40103(b)(1)'s nor § 44715's language supports an inference that the FAA cannot utilize various methods to regulate aircraft noise.⁶⁷ Second, because *American Petroleum* deals with the EPA's bold disregard of an express congressional restriction, the court appropriately rejected HAI's

⁵⁹ See *id.*

⁶⁰ See 49 U.S.C. § 40103(b)(2) (2006).

⁶¹ Richard Kahn, Comment, *Inverse Condemnation and the Highway Cases: Compensation for Abutting Landowners*, 22 B.C. ENVTL. AFF. L. REV. 563, 576 (1995).

⁶² Falzone, *supra* note 1, at 770, 784.

⁶³ See *supra* notes 13, 17 and accompanying text.

⁶⁴ *Helicopter Ass'n Int'l*, 722 F.3d at 433–35.

⁶⁵ See *id.* at 433.

⁶⁶ See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984).

⁶⁷ See 49 U.S.C. §§ 40103(b)(1), 44715 (2006).

reliance on that case.⁶⁸ In contrast, the instant case deals with the FAA's promotion of explicit congressional goals set forth in § 40103.⁶⁹ Specifically, the Final Rule furthers § 40103's separate goals: (1) to create certain exceptions and minimize inter-aircraft interaction, which adequately addresses safety concerns; (2) to locate a route close to shore that provides efficient use of aircraft space; and (3) to protect individuals and property on the ground.⁷⁰

In analyzing *Chevron's* first step, the court incorrectly assumed that because noise can give rise to "actionable nuisance," Congress intended to authorize the FAA to prescribe air traffic regulation for the very purpose of preventing noise nuisances.⁷¹ The court failed to consider that "barking dogs, music, windmills, and loud voices" can also qualify as actionable offenses under common law nuisance claims.⁷² Congress's consciously chosen "shall prescribe" language in § 40103(b)(2) as opposed to the shall prescribe "as deem[ed] necessary" language in § 44715 clearly manifests Congress's intent to require the FAA to set air traffic regulations to protect individuals and property from the detrimental effects of aircraft noise.⁷³ Specifically, insignificant noise levels—similar to barking dogs or music—emitted by aircraft flying at high altitudes hardly "injure, destroy, or detrimentally affect" humans and property on the ground.⁷⁴ Assuming *arguendo* that the court's nuisance analysis is proper, it would impose significant burdens on the FAA by requiring the agency to act every time an aircraft caused a common law nuisance. Oddly, the court adopted the *DiPerri* court's nuisance theory but rejected *DiPerri's* unpersuasive view.⁷⁵ However, the court's improper reliance on common law nuisance does not alter the congressionally explicit goals set forth in the FAA's general authority under § 40103.⁷⁶ The court stressed that (1) the agency must exercise its general authority to "balance[] safety concerns appropriately," and (2) § 40103 is limited to situations in which "reducing noise through altering flight routes can protect prop-

⁶⁸ *Am. Petroleum Inst. v. EPA*, 52 F.3d 1113, 1117 (D.C. Cir. 1995).

⁶⁹ *Helicopter Ass'n Int'l*, 722 F.3d at 433–34.

⁷⁰ See *The New York North Shore Helicopter Route*, 77 Fed. Reg. 39,911, 39,911–13 (July 6, 2012) (to be codified at 14 C.F.R. pt. 93).

⁷¹ See *Helicopter Ass'n Int'l*, 722 F.3d at 434.

⁷² John Copeland Nagle, *Moral Nuisances*, 50 EMORY L.J. 265, 282 (2001).

⁷³ Compare 49 U.S.C. § 40103 (2006), with 49 U.S.C. § 44175 (2006).

⁷⁴ See *Helicopter Ass'n Int'l*, 722 F.3d at 434.

⁷⁵ See *supra* notes 43–45 and accompanying text.

⁷⁶ See 49 U.S.C. § 40103.

erty on the ground.”⁷⁷ The court’s emphasis on § 40103’s procedural limitations confirms the FAA’s limited discretion, provides protection for the small entities that may be subject to possible FAA abuse, and encourages the FAA to draft its justifications for regulations more carefully.⁷⁸

Critics of this case may argue that the court improperly expanded the FAA’s § 40103 authority to the regulation of residential-area aircraft noise, and that the court’s decision will likely have undesirable implications for the helicopter industry and for the agency because communities around the country will expect more agency action.⁷⁹ However, such critics fail to consider prior FAA noise-abating air traffic regulations that protect private and public land. For example, the FAA has reduced the adverse impact of aircraft noise by routing low-altitude terminal traffic away from Oberlin College, by prohibiting helicopters from flying over Mount Vernon, and by banning commercial air-tour operations over Rocky Mountain National Park.⁸⁰ Given the FAA’s long-standing practices, the Final Rule hardly reflects a change in the agency’s enforcement action; rather, it coincides with the agency’s expansive role in managing airspace to control aircraft noise. Accordingly, this decision will neither unduly influence the agency’s discretion, nor create “far-reaching consequences for the helicopter industry and [the] FAA.”⁸¹

In sum, the most important and practical implication of this case is that it advances congressional intent to vest the FAA with the right to regulate air traffic noise for the protection of the community. Although helicopters “will [eventually] incorporate better technology and become less noisy,” for now, communities around the country must rely on the FAA for protection from the unbearable noise of low-flying helicopters.⁸² By holding helicopter operators accountable for the excessive noise produced by their helicopters, the D.C. Circuit incentivizes both cooperation with the FAA in resolving the impact of noise on residential areas and the production of quieter aircraft.

⁷⁷ See *Helicopter Ass’n Int’l*, 722 F.3d at 434 (emphasis omitted).

⁷⁸ See *id.* at 433–35.

⁷⁹ See Gerald F. Murphy & Steven J. Seiden, *Regulating Annoyance: FAA’s North Shore Helicopter Route Final Rule*, 26 No. 2 AIR & SPACE LAW. 4, 7 (2013).

⁸⁰ The New York North Shore Helicopter Route, 77 Fed. Reg. 39,911, 39,911 & n.11 (July 6, 2012) (to be codified at 14 C.F.R. pt. 93).

⁸¹ See Murphy & Seiden, *supra* note 79, at 7.

⁸² The New York North Shore Helicopter Route, 77 Fed. Reg. 39,911 at 39,913.

